APPENDIX

APPENDIX A

Second Amended Complaint

[Filed March 31, 1965]

[Original Complaint Filed September 27, 1960.
Amended Complaint Filed February 15, 1961.]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Civil No. 30613

WILSON P. LOCKRIDGE, *Plaintiff*,

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union,
Defendants.

SECOND AMENDED COMPLAINT

COMES Now plaintiff above named and for cause of action against defendants and each of them, complains and alleges as follows:

COUNT ONE:

I

That the defendant, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter referred to as the International Association, is an organized association having as members various workmen skilled and trained in operating passenger motor busses including those owned and operated by Greyhound Corporation throughout the State of Idaho. That said

International Association has its own duly elected officers acting for and on behalf of the International Association and having ultimate control and supervision over all of the members of the International Association and the various regional divisions.

II

That the Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter referred to as Division 1055, is a regional division of the International Association and includes as members thereof all members of the International Association who live and work within the regional boundaries of Division 1055. That said Division 1055 has its own duly elected officers but that all members of Division 1055, and the officers thereof, as members of the International Association, are subject to ultimate authority and control of the International Association and are all subject to ultimate authority and control of the International Association and are all subject to the constitution and general laws of the International Association.

III

That the International Association, through its international officers and officers and agents of Division 1055, have conducted and are conducting business within the State of Idaho and at various times officers and agents of both the International Association and Division 1055 are within the State of Idaho acting for and on behalf of said International Association, Division 1055 and the members of the International Association. That many members of the International Association and Division 1055 thereof live in and are employed within the State of Idaho. That the International Association and regional division are the exclusive representatives of all members of the union for the purpose of collective bargaining relative to conditions of employment and for negotiation and execution of con-

tracts with employers pertaining to such matters, and officers and agents of the International Association and Regional Division 1055 come into the State of Idaho to bargain with employers on behalf of members and to negotiate contracts between employers and the union on behalf of its members. That by the constitution and general laws of the International Association, said association and the regional division in which the member resides are irrevocably authorized to act as agents for all members before any committee, board of arbitration, arbiter, court or any tribunal in any matter affecting members' status as an employee and to represent and bind the members in the presentation, prosecution, adjustment and settlement of grievances, complaints and disputes arising out of the members' employment relationship.

IV

That since on or about May 16, 1943 and to and including on or about November 2, 1959, plaintiff was a member of the International Association within the area of Regional Division 1055 thereof, and was employed as a bus driver for Greyhound Corporation, a private corporation having as its main business purpose, the operation of public busses. That all drivers of Greyhound busses, and other public bus lines, are members of the International Association and no person can be employed as a bus driver nor retain such employment unless he is a member of said International Association. That on November 2, 1959, plaintiff had over 16 years seniority as a bus driver with Greyhound Corporation and under contracts between the International Union, its regional divisions and Greyhound Corporation, seniority in said employment has commensurate therewith benefits in working conditions and compensation.

V

That prior to November 2, 1959, C. A. Bankhead, Treasurer and Financial Secretary of Division 1055, acting

for Division 1055 in his official capacity as such Treasurer and Financial Secretary, and acting for and on behalf of the International Union and the officers thereof, suspended plaintiff from membership in the union on the basis that the plaintiff was in arrears in his payment of dues contrary to the requirements of the constitution and laws of the union and thereafter notified Greyhound Corporation that plaintiff was no longer a member in good standing of the union and requested said Greyhound Corporation to remove plaintiff from employment. That immediately following the receipt of such notice, on or about November 2, 1959, said Greyhound Corporation discharged plaintiff from employment. That plaintiff was not in arrears in his dues to the extent that he was subject to suspension from union membership under the constitution and laws of the International Association, and the acts of said Bankhead, aforesaid, were wrongful and without any lawful basis. That additionally, it has been customary over the years, on numerous occasions, for members to be in arrears in their dues and to plaintiff's knowledge no member of the union has ever been suspended from membership therein within Division 1055 by reason thereof.

VI

That at the time of his discharge from employment as aforesaid, plaintiff was 46 years of age, earning in his employment an average of approximately $7,200.00 per year and with his seniority status, barring unforeseen death or disablement, would be able to earn in the future for the next 20 years and until he became 65 years of age, in excess of $7,200.00 per year, and additionally, at the age of 65 years would have been able to retire with retirement pay of approximately $3,600.00 per year.

VII

That in suspending plaintiff from membership in the International Association which resulted in plaintiff's loss

of employment, the defendant International Association and Division 1055, acting by and through their duly authorized officers and agents, acted wantonly, wilfully and wrongfully and without just cause, and to plaintiff's knowledge, in a manner never before indulged in, and have deprived plaintiff of his livelihood and all benefits of his employment with Greyhound Corporation that accrued to him and would accrue to him by reason of his employment, seniority and experience, and plaintiff has been harassed and subject to mental anguish, all to plaintiff's damage in the sum of $212,200.00.

VIII

That in suspending plaintiff from membership in the International Association as aforesaid, said International Association and Regional Division 1055 thereof, acting through its officers and agents, acted contrary to all custom within said union since, to plaintiff's knowledge, no member of said union, within Region 1055, had heretofore been so suspended for arrears in dues and said International Association and Division 1055 thereof, acting by and through its duly authorized officers and agents, proceeded contrary to the constitution and laws of the International Association and precluded plaintiff from any remedy he may have under said constitution and laws. That nevertheless plaintiff did all things and performed all acts which would have been required of him under the constitution and laws had the International Association and Division 1055 acted in conformance with the requirements of the constitution and laws of the union, but to no avail. That further, any acts on the part of the plaintiff for reinstatement to membership were and would have been useless procedures on his part, it being the attitude of the officers of the International Association and Division 1055 that plaintiff would not be reinstated to membership in the International Association under any circumstances.

COUNT TWO:

I

Plaintiff repeats and realleges all of the allegations contained in paragraphs I, II, III, IV, V, VI and VIII of Count One.

II

That section 83 of the constitution and general laws of the International Association provides that no member shall be allowed to injure the interests of a fellow member by undermining him in place, wages or in any other wilful act by which the reputation or employment of any member may be injured. That in wrongfully suspending plaintiff from membership in the International Association, which resulted in plaintiff's discharge from employment with the Greyhound Corporation, the defendant International Association and Regional Division 1055 thereof, acting by and through its authorized officers and agents, acted wrongfully, wantonly, wilfully and maliciously and without just cause and violated the constitution and general laws of the International Association which constituted a contract between the plaintiff as a member thereof and the International Association, and as a result of said breach of contract plaintiff has been deprived of his livelihood and all benefits from his employment with said Greyhound Corporation that have accrued and would accrue to him by reason of such employment, his seniority and experience and plaintiff has been embarrassed and subjected to mental anguish, all to plaintiff's damage in the sum of $212,200.00.

WHEREFORE, plaintiff prays judgment against the defendants and each of them, for the sum of $212,200.00, together with costs and disbursements incurred herein and such other and further relief as to the court may appear meet and equitable in the premises.

ANDERSON, KAUFMAN AND ANDERSON

/s/ SAMUEL KAUFMAN
A member of the Firm
501 Idaho Bldg., Boise, Idaho
Attorneys for Plaintiff

APPENDIX B

District Court Memorandum Decision

[Filed April 7, 1961]

* * * * * * * * * *

This matter is before the Court pursuant to motions by the defendant under the provisions of Rule 12 (b) I.R.C.P. The defendant Greyhound Corporation of America has been dismissed, and plaintiff has filed an amended complaint against the remaining defendants. Thus, only the motions of Amalgamated Association and the Northwest Division 1055 of the Amalgamated Association are before the Court. It has been stipulated that the motion to dismiss directed to the first complaint, may be considered as directed to the amended complaint of plaintiff.

Paragraphs I and II of the motion are to quash the return of service of summons and dismiss the action against Northwest Division and Amalgamated Association on the ground of improper service or service which did not give the Court jurisdiction of these parties. I am of the opinion that these motions are not well taken, for the reasons set forth by plaintiff in his original memorandum in this case, pages 1 through 5.

Paragraph III is that the complaint fails to state a claim upon which relief can be granted. The serious objection here raised, is that defendant has not alleged an exhaustion of remedies within the internal organization of defendant unions. While this may represent a condition precedent, which must be proved, I am of the opinion that under our system of notice pleading, plaintiff's allegations that the defendant unions precluded him from any remedy he might have in the union and that he did all things required of him under the union constitution, and that any further proceedings would have been useless, is sufficient as against a motion to dismiss. Thus, I am of the opinion that this

complaint does state a claim upon which relief could be granted, and therefore paragraph III will be denied.

Paragraph IV of the motion contends that the counsel of Western Greyhound Amalagamated Divisions is an indispensable party to the action not within the jurisdiction of the Court, because it is the party which made a collective bargaining agreement with the Western Greyhound Lines. As the case is now pled, if it is not pre-empted, it must rest upon a ground which does not involve an unfair labor practice. Thus the Council of Western Greyhound Amalgamated Divisions is not an indispensable party. Therefore Paragraph IV of the motion will be denied.

Paragraph V of the motion will be denied, for the reasons stated in open court when the matter was argued. See Rule 8 (e) 2 and Rule 18 (a) I.R.C.P.

Paragraph VI of the motion to dismiss raises by far the most difficult problem. This is a contention by the defendants that the matters alleged by plaintiff constitute an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board (Title 29 U.S.C.A. Par. 157 and 158). If this contention is correct, then the matters involved in this case have been pre-empted by operation of Federal law. Plaintiff, on the other hand, contends that the matters alleged involve private right of the plaintiff, and in essence it actually is an action for breach of a contract between plaintiff and defendants, the contract in question being the constitution of the union.

The state courts, the lower Federal courts, and the U.S. Supreme Court have had great difficulty in defining the areas which have been pre-empted by the N.L.R.A. In my opinion the state Court opinions are impossible to reconcile, as are the U.S. Supreme Court opinions. However, the U.S. Supreme Court in *San Diego Buildings Trade Council* v. *Garmon*, 359 U.S. 236, 3 Law Ed. 2d, 775, 75 Sup. Ct. 772, has made an attempt to finally define this

question and has in effect narrowed or overruled some of its earlier decisions in this matter. In this so-called second Garmon decision, the Supreme Court of the United States, after stating that the policy of Congress has been to centralize labor-management relations in the N.L.R.B. as a matter of national policy, and that "when the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting", designates only two areas in which the power of the states to regulate industrial relations have not been pre-empted.

These are matters which are of "merely peripheral concern" to labor-management relations. The only example of this type of situation is *Association of Machinists* v. *Gonzales*, 356 U.S. 617, 2 Law Ed. 2d 1018, 78 Sup. Ct. 923.

Secondly, matters "deeply rooted in local feeling and responsibility." I.e., violence and breaches of the peace. The Court cites as an example only *International Union* v. *Russell*, 356 U.S. 634, 2 Law Ed. 2d 1030.

The Court then goes on to say that if a matter is "arguably" within paragraph 7 or paragraph 8 of the N.L.R.A. then the state courts, as well as the federal courts, must defer to the N.L.R.B. and that the N.L.R.B. itself is the agency which must determine in the first instance whether a matter is an unfair labor practice or not.

Thus it seems to me that the present rule is, that the state or federal court must first determine whether a case falls clearly in or out of the exclusive jurisdiction of the N.L.R.B. If it is clearly outside, the courts can take jurisdiction. If it is clearly within the N.L.R.B.'s exclusive jurisdiction or is in the twilight zone, then the courts, both state and federal, must await determination by the administrative board as to whether the matter is deemed by it to

be within its jurisdiction. Justice Harland [*sic*] in his dissenting opinion to the Garmon case states as much.

> "Henceforth the states must withhold access to their courts until the N.L.R.B. has determined what unprotective conduct is not an unfair labor practice. * * *"

It was clear that plaintiff in his original complaint alleged an unfair labor practice against Greyhound Corporation under Section 158, 29 U.S.C.A., and his terminology in his first complaint as it related to the actions of defendant union clearly indicated an unfair labor practice. In that complaint, the plaintiff several times alleged that all of defendants' acts were for the purpose of seeking a discriminatory discharge by his employer. The gravamen, it seems to me, of his present pleading is the same, in that he alleges that the defendant union wrongfully expelled him for alleged failure to pay dues; that as a result of his expulsion he lost his employment with Greyhound Corporation and to his damage. There is a clear inference that the union did this to make an example of him and to cause him to lose his employment, rather than to collect dues. If this is the claim, it is at least arguable that this constitutes an unfair labor practice. If plaintiff were seeking reinstatement in the union, such as was done in the Gonzales case, together with loss of wages during the period of his wrongful expulsion and other incidental damages, such as his claimed punitive damages and mental pain and suffering, he would have been bringing an action to assert his rights as a member of the union against the union. However, he goes far beyond this, although it would appear that reinstatement would afford him a full remedy in that it does not appear that he could not get his job back if he were reinstated. In this case plaintiff seeks to recover damages for future loss of gainful employment and the allegations would fit a tort claim for total future disability for gainful employment. It seems obvious that he is not

interested in getting back his job or asserting his union rights.

Under the rule announced by Judge Cohen in *Wax* v. *International Mailers Union,* 161 A2d 603 (Pa.), (whose analysis of the Garmon decision agrees with mine) plaintiff is asserting an unlawful labor practice, because he is seeking damages based upon *injuries to his employment,* as distinguished from damages based *upon injury to his rights as a union member.*

Further it appears to me that plaintiff in paragraphs I, II, III, IV, V, VI and VIII of all these counts of his amended complaint, has alleged an unlawful labor practice upon the part of the union, which is at the very least arguably within the provisions of Sections 7 and 8 of the N.L.R.A. It falls under the statement made by an annotation in *4 L. Ed. page 2022:*

> "Under the terms of Par. 8 (a) (3) of the amended National Labor Relations Act, unions and employers are permitted to agree that union membership shall be a condition of employment; but a proviso to par. 8 (a) (3) bars an employer who has entered into such an agreement from discriminating against an employee for nonmembership in a union if he has reasonable grounds for believing that membership was not available to the employee in question on the same terms and conditions generally applicable to other union members, or if he has reasonable grounds for believing that the membership of the employee in question was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining union membership. A complementary provision appears in par. 8 (b) (2) of the act, which specifies that it is an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee who has been

denied, or ousted from, union membership on grounds other than his failure to tender uniformly required dues and initiation fees."

Thus it seems clear to me that plaintiff alleges that defendants had entered into a lawful union security contract with plaintiff's employer Greyhound; that the plaintiff's alleged failure to pay dues when due was the claimed cause of his loss of union membership, but that the real cause was something else, and that in fact the union had waived its right or is estopped to assert its right to deny him membership on this ground; that it in effect caused plaintiff's employer to discriminate against him on grounds other than failure to tender uniformly required dues; that this constitutes an unfair labor practice and that jurisdiction of this type of situation has been taken by the N.L.R.B. in this type of situation is illustrated by the cases appearing in the above cited annotation. In particular see cases listed under 9th Circuit.

I therefore conclude that defendants' motion to dismiss on the ground that the courts of Idaho lack jurisdiction, should be granted.

Dated this 7th day of April, 1961.

/s/ MERLIN S. YOUNG
District Judge

APPENDIX C

Idaho Supreme Court Decision

[Filed March 23, 1962]

IN THE SUPREME COURT OF THE STATE OF IDAHO

Boise, January Term, 1962

No. 9040

WILSON P. LOCKRIDGE, *Plaintiff-Appellant,*

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union,
Defendants-Respondents.

Appeal from the District Court of the Third Judicial District, Ada County. Honorable Merlin S. Young, District Judge.

Action for damages for wrongful suspension from membership in the defendant union. Plaintiff appeals from judgment of dismissal. *Reversed* and cause remanded.

Anderson, Kaufman and Anderson, Boise, for appellant.

Bailey, Lezak, Swink & Gates, Portland, Oregon;
Bernard Cushman, Washington, D. C.; and
McClenahan & Greenfield, Boise; for respondents.

TAYLOR, J.

This action was brought by plaintiff (appellant) to recover judgment for compensatory and punitive damages against defendant (respondent) labor union for wrongful

suspension of plaintiff's membership. Plaintiff alleges that he was a member of the union from May, 1943, to about November 2, 1959, during which time he was employed by Greyhound Corporation as a bus driver; that his suspension from membership was based upon the contention that plaintiff was in arrears in the payment of his dues, contrary to the constitution and laws of the union; that the union notified the Greyhound Corporation that plaintiff was no longer a member and requested the corporation to discharge him which the corporation did on or about November 2, 1959, pursuant to the request and its contract with the union; and that suspension from membership was not in accord with the constitution and laws of the union, and was wrongful and without lawful basis. The complaint contains two counts in tort and one for breach of contract.

Upon motion of the defendant, the action was dismissed by the district court upon the sole ground that the complaint charged an unfair labor practice, within the exclusive jurisdiction of the National Labor Relations Board, and that the district court had no jurisdiction of the subject matter.

Plaintiff prosecutes this appeal from the judgment of dismissal.

Unincorporated associations, including labor unions, are recognized as legal entities under the laws of this state. I. C. §§ 44-701, 18-5201, 72-1010, 63-3002, 30-101(14).

The constitution and bylaws of the defendant union and the granting and acceptance of membership, constituted a contract between the plaintiff and defendant. 7 C.J.S., Associations, § 11b.

The question presented is whether the cause is one preempted by the Labor Management Relations Act of 1947. Section 7 of the act (U.S.C.A., Title 29, § 157) declares the right of employees to organize and engage in collective bargaining. Section 8 (U.S.C.A., Title 29, § 158) defines

unfair labor practices on the part of both employer and employee. This section in part provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

The opinion in International Association of Machinists v. Gonzales, 356 U.S. 617, 2 L.ed 2d 1018, 78 S. Ct. 923, was rendered in an action brought in the Superior Court of California by an expelled union member, for reinstatement and damages. The California court gave judgment for the relief sought. The U. S. Supreme Court noted that to cause an employer to discriminate against an employee on some ground other than denial or termination of membership for failure to pay dues, might constitute an unfair labor practice, under § 8(b)(2). With respect to the relationship between the union and the member, the court said:

"• • • But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power

has been expressly denied. The proviso to § 8(b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .' 61 Stat. 141, 29 USC § 158(b)(1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entangelment with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See United Constr. Workers v. Laburnum Constr. Corp., 347 US 656, 98 L ed 1025, 74 S Ct 833.

"Although petitioners do not claim that the state court lacked jurisdiction to order respondent's reinstatement, they do contend that it was without power to fill out this remedy by an award of damages for loss of wages and suffering resulting from the breach of contract. No radiation of the Taft-Hartley Act requires us thus to mutilate the comprehensive relief of equity and reach such an incongruous adjustment of federal-state relations touching the regulation of labor. The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although if the unions' conduct constituted an unfair labor practice the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board

does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered. See International Union, United A.A.A.I.W. v. Russell, 356 US 634, 2 L ed 2d 1030, 78 S Ct 932." International Asso. Machinists v. Gonzales, 356 U.S. 617, 2 L.ed 2d 1018, at 1021 and 1022, 78 S.Ct. 923.

Defendant cites Garner v. Teamsters C. & H. Union, 346 U.S. 485, 98 L.ed 228, 74 S.Ct. 161. Distinguishing that case, the court, in United Constr. W. v. Laburnum Constr. Corp., 347 U.S. 656, 98 L.ed 1025, at 1031, 74 S.Ct. 833, said:

"* * * In the Garner Case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct."

Defendant also relies upon San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 3 L.ed 2d 775, 79 S.Ct. 773. It is contended that the Garmon case reaffirms the Garner case and modifies and supersedes the Gonzales decision as to preemption. The Court split 5-4 as to the applicable ground for the preemption affirmed in the Garmon case. The majority opinion was written by Justice Frankfurter, also the author of the opinion in the Gonzales case.

In the Garmon case the unions sought an agreement by the employer that the latter would retain in his employ only union members and those who applied for membership

within thirty days. Upon refusal, the unions began peaceful picketing, claiming their purpose was to educate and persuade the workers. The employer obtained a judgment in the Superior Court of California for damages and enjoining the picketing on the ground that its purpose was to force the employer to execute the requested contract, contrary to California law. The California Supreme Court affirmed, noting that, since the National Labor Relations Board had refused to take jurisdiction of the controversy, the state courts had power over the dispute.

On the first appeal, the United States Supreme Court ruled that the refusal of the National Labor Relations Board to assert jurisdiction did not leave the state free to act, and remanded the cause for determination by the California court as to whether California law would support the judgment for damages. The California court vacated the injunction and affirmed the damage judgment.

On the second appeal (supra) the court said:

> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. Ibid.
>
> "To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. * * * *
>
> "* * * In the absence of the Board's clear determination that an activity is neither protected nor

prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. • • • •

"In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 3 L.ed 775, at 783 and 784, 79 S.Ct. 773.

Thus, the Supreme Court reaches the conclusion that the Congress has delegated to the National Labor Relations Board the legislative function of determining national policy, even though the act itself purports to spell out such policy (U.S.C.A., Title 29, §§ 141, 151). And the court abdicates, in favor of the board, the judicial function of determining legislative intent. Being an agency also of the executive branch of the government, the board is thus clothed with complete power—to make, to interpret, and to enforce the law. The citizens of the states must be content with what relief the board chooses to afford. Or, if the board refuses to act in any arguable area, citizens of the states must suffer torts and violations of contract rights without relief. Anent the effect of this decision on state jurisdiction, the four justices concurring in the result said:

"The Court's opinion in this case cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an

> unfair labor practice, a course which, because of unavoidable Board delays, may render state redress ineffective. And in instances in which the Board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief. Moreover, since the reparation powers of the Board, as we observed in Russell, are narrowly circumscribed, those injured by nonviolent conduct will often go remediless even when the Board does accept jurisdiction." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 3 L.ed 775, at 787 and 788, 79 S.Ct. 773.

Referring to the Gonzales case, Justice Frankfurter in the second Garmon case said:

> "* * * However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See International Asso. of Machinists v. Gonzales, 356 US 617, 2 L ed 2d 1018, 78 S Ct 923." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 3 L. ed 2d 775, at 782, 79 S. Ct. 773.

Thus, even though the "penumbral area" may be broadened by the Garmon decision, the rule of the Gonzales case, applicable here, has not been supplanted.

In view of the unsettled state of the federal law, our course is clear. We must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs "neither protected nor prohibited" nor "preempted" by federal law, or, more appropriately, by the National Labor Relations Board.

Morse v. Local Union No. 1058 Carpenters, etc., 78 Idaho 405, 304 P.2d 1097, is not applicable here. In that case

Morse, a member, brought action against the union for damages arising out of loss of employment due to refusal of the union to permit him to transfer from one local to another. The resulting discrimination did not result from a failure to pay dues. Moreover, the opinion in the Morse case was handed down more than a year before the decision of the Gonzales case, hence we did not have the benefit of that, and other later opinions of the federal courts in arriving at the conclusion reached in the Morse case.

We hold that under the rule of the Gonzales case the district court had jurisdiction of this controversy, and that the Garmon case is not in point. Gainey v. Local 71 International Bro. of Teamsters (N.C.), 113 S.E.2d 594; Barlow v. Roche (D.C.), 161 A.2d 58; Dempsey v. Great Atlantic and Pacific Tea Co., 197 N.Y.S.2d 744; Perko v. Local No. 207 of Int. Ass'n of Bridge, etc., Wkrs., (Ohio), 167 N.E.2d 903; United Association of Journeymen, etc. v. Borden (Tex.), 328 S.W.2d 739; Green v. Folks, 208 N.Y.S. 2d 559. See also: Selles v. Local 174, etc. (Wash.), 314 P.2d 456, Cert. denied, 356 U.S. 975, 2 L.ed 2d 1149, 78 S.Ct. 1134, rehearing denied, 358 U.S. 860, 3 L.ed 2d 95, 79 S.Ct. 14; Kuzma v. Millinery Workers Union Local No. 24 (N.J.), 99 A.2d 833; McDermott v. Jamula (Mass.), 154 N.E.2d 595; Cooperative Refinery Asso. v. Williams (Kan.), 345 P.2d 709.

The judgment of dismissal is reversed and the cause is remanded for further proceedings.

Costs to appellant.

SMITH, C.J., and KNUDSON, MCQUADE and MCFADDEN, JJ., concur.

APPENDIX D

District Court Memorandum Decision

[Filed December 21, 1962]

* * * * * * * * * * *

This matter is before the Court for its ruling upon paragraphs I, II and IV of plaintiff's motion to strike directed to the answer of defendants filed herein.

The Court's ruling on these paragraphs was reserved after oral arguments, subject to the filing of briefs of the parties. All briefs have now been filed with the Court.

After an examination of the record, including exhibits attached to the pleadings and exhibits and documents produced by interrogatories and discovery, I have concluded that plaintiff's motion should be granted as to paragraphs I, II and IV.

My reasons for so deciding, briefly stated, are these:

With regard to the conclusions of defendants in paragraph VI of defendants' first affirmative defense, I have concluded that the provisions of the general constitution and the agreement with Greyhound are so clear and unambiguous that they require no interpretation, and that their correct interpretation is as plaintiff contends. The Union's security clause in the contract (Exh. B) merely requires that employees covered by the contract shall remain members of the Union as a condition precedent to continued employment. It is clear that under the terms of the constitution, Section 91, plaintiff was still a member of the Union at the time of the occurrences in question, although not in good financial standing. The agreement (Exh. B) does not authorize defendants to cause plaintiff's discharge for such a condition. I thus conclude this purported defense is sham and should be eliminated at this time so it will not confuse the issues at time of trial.

With regard to paragraph IV seeking to strike defendants' second affirmative answer and defense, I conclude that it is also completely sham and irrelevant because it is dealing solely with employee grievances with their employing company, and by its terms it is obvious that it has nothing to do with internal administrative procedures within the Union insofar as it relates to disputes between the Union and its members.

Counsel for plaintiff is requested to prepare a formal order in accordance with this memorandum opinion.

Dated this 21st day of December, 1962.

/s/ MERLIN S. YOUNG
District Judge.

APPENDIX E

District Court Memorandum Decision

[Filed June 21, 1966]

* * * * * * * * * * *

This matter has been in court since September of 1960. In his original complaint plaintiff sued the defendant unions and Greyhound Corporation. Thereafter plaintiff voluntarily dismissed Greyhound Corporation. This Court thereafter granted the unions' motion to dismiss plaintiff's complaint on the ground that the courts of the State of Idaho lacked jurisdiction because the matter in controversy "arguably" involved unfair labor practices under Sections 7 and 8 of the N.L.R.A., and thus was "pre-empted." In making this ruling, this Court relied upon *San Diego Buildings Trade Council* v. *Garmon,* 359 U.S. 236, 3 Law Ed. 2d 775, 75 Sup. Ct. 772, and *Wax* v. *International Mailers Union,* 161 A 2d 603 (Pa.). At this same time I denied defendants' motions to dismiss plaintiff's complaint upon the following grounds: That the complaint failed to state a claim; that defendants were not properly served

with process; that the Council of Western Greyhound Amalgamated Divisions is an indispensable party to the action; that there has been a misjoinder of causes of action. These rulings stand.

The above order of dismissal of this Court was appealed to the Supreme Court of Idaho and reversed by unanimous decision in March of 1962 (*Lockridge* v. *Amalgamated Association, et al.,* 84 Idaho 201; 365 Pac. 2d 1006). In doing so, the Idaho Supreme Court said: "We hold that under the rule of the Gonzales case the District Court had jurisdiction of the controversy and that the Garmon case is not in point." The Court was referring to *Association of Machinists* v. *Gonzales,* 356 U.S. 617, 2 Law Ed. 2d 1018, 78 Sup. Ct. 923.

Following the Idaho Supreme Court decision and after much delay as the result of numerous conferences and motions, the matter became at issue, and was tried before this Court in October of 1965.

There is very little dispute over the facts. In summary, my opinion is that the plaintiff has established by a preponderance of evidence that the defendants through their officers wilfully and intentionally caused a termination of plaintiff's employment with Greyhound Corporation pursuant to the provisions of a collective bargaining agreement with Western Greyhound Lines, which agreement provided that all employees "shall remain members (of Division 1055) as a condition precedent to continued employment," on the ground that plaintiff was not a member of Division 1055 in good financial standing. However, in fact, at the time of termination of his employment, plaintiff was a *member* of Division 1055 under the terms of the Union Constitution, although he was not in good financial standing because he was one month delinquent in payment of his dues.

Following termination of plaintiff's employment, he made some efforts to seek reinstatement in the union through

union procedures. The defendants contend the plaintiff failed to exhaust his internal union remedies, and this alone should be sufficient to bar his action. (87 ALR 2d 1099-1103) While plaintiff could have made a better legal record of his attempts to seek reinstatement through union procedures, I conclude that the facts taken as a whole and the inferences which I believe may legitimately be drawn therefrom indicate that further attempts to follow procedures provided by Section 81 of the Union Constitution would have been futile. The International President Elliott, Charles C. McCaffery, an International Vice President, and E. W. Oliver, a member of the General Executive Board, were aware of and approved of the decision of the Financial Secretary of Division 1055 to ask plaintiff's termination with Greyhound. I am convinced that the true facts are that the defendants' officers were irritated by plaintiff's refusal to go along with a voluntary dues check-off by Greyhound and mistakenly believing that they were technically correct, asked plaintiff's termination under the collective bargaining agreement because he was not in good standing. In doing so, they decided to make an example of plaintiff. They have held to such technical position since, although the collective bargaining agreement by its unambiguous terms only requires that plaintiff remain a *member* of defendant union as a condition of employment, as contrasted to a requirement that the employee be a *member in good standing.* Defendants would bind plaintiff to a claimed mutual understanding between the employer and the defendants, apparently arrived at by ESP that the agreement did not mean what it plainly says. Likewise they ignore the custom and tradition of tolerance by the union of such short term delinquency.

Likewise, I conclude that to pursue grievance procedures against Greyhound Corporation, as provided in the collective bargaining agreement, would be an application of the grievance procedure to a situation which was never

intended to be covered by it. The dispute herein, under the pleadings and theories of the case accepted by the Idaho Supreme Court, lies between defendants and plaintiff, or between the union and its member, and not between an employer and its employee. Defendants urge the rule in the case of *Republic Steel Corporation* v. *Maddox,* 379 U.S. 650, 13 L. Ed. 2d 580, 85 Sup. Ct. 614, which requires that an employee pursue grievance procedures before suing in court for contract benefits provided under a collective bargaining agreement. The factual situation here is very different from Maddox.

Thus, although I have not spelled out my findings in detail, I find that the allegations of Paragraphs I, II, III, IV, V and VIII of plaintiff's second amended complaint are sustained by a preponderance of the evidence and well state the ultimate facts which have been proved in this case.

In view of the foregoing holding, except for the question of damages, which will be discussed hereafter, the only remaining issue is the legal one of whether under the above stated findings this court or any state court has jurisdiction of the issues involved in this case. Although the pleadings have been amended rather substantially, the pre-emption issue is the same as it was when this matter first went to the Idaho Supreme Court. I think defendants' position on this issue is greatly reinforced by *Plumbers' Union* v. *Borden,* 373 U.S. 690, 10 L. Ed. 2d 638, 83 Sup. Ct. 1423; *Iron Workers* v. *Perko,* 373 U.S. 701, 10 L. Ed. 2d 646, 83 Sup. Ct. 1429; and *Day* v. *Northwest Division 1055, et al.,* 236 Ore. 624, 389 Pac. 2d 42. Plaintiff continues to claim that he is entitled to damages for injury to his employment as distinguished from remedies for loss of union rights; nevertheless, I feel that I have been virtually directed by the Idaho Supreme Court to decide this case on the theories of "Gonzales," and I must consider that decision the law of this case. In Gonzales, the plaintiff primarily sought reinstatement in the union so he could work on union con-

struction jobs. Damages were incidental to this relief. The same relief would under the theories of plaintiff in this action afford him the major part of his remedy.

I thus conclude that although plaintiff has never sought such remedy, he is entitled to restoration of his membership in defendant unions upon payment of current dues, and in addition he is entitled to actual damages suffered as a result of loss of membership from the time of its wrongful termination to its restoration.

The record does show that his loss of membership did deprive him of employment with Greyhound and other bus driving jobs. He was not equipped by education or experience to find other employment with a comparable income. Using the earnings of Greyhound driver Francis Carter who took plaintiff's place on the seniority list as compared to plaintiff's earnings as shown by his income tax returns between November 3rd, 1959, to September 15, 1965, I find the plaintiff's actual damages resulting from loss of his driving job with Greyhound have been $32,678.56. This amount was computed as follows:

Year	Carter	Plaintiff Lockridge
1959	$ 6,017.57	$ 5,014.38
1960	6,750.27	489.40
1961	7,410.50	258.00
1962	7,213.63	350.00
1963	8,093.61	2,185.00
1964	8,265.50	5,000.00
1965 (thru Sept. 15)	6,185.74	3,961.50
	$49,936.84	$17,258.28

However, I conclude the plaintiff is not entitled to future damages arising from continued loss of employment with Greyhound because "Gonzales" and the theories thereof contemplate that restoration of union membership will afford full relief and allow his reemployment at the same

job. However, I further find that plaintiff is entitled to accruing damages at the rate of $3,500.00 per year until membership in the union is fully restored. Although plaintiff will theoretically lose seven years of seniority with Greyhound, I have no way of computing the value of said loss. Likewise the monetary value of any retirement and insurance benefits lost during this period has not been established.

I further conclude that plaintiff is not entitled to punitive damages against defendants. I do not find their acts wanton and willful or oppressive to the extent which has been required in the past by Idaho decisions; and, as indicated above, I believe that the union, although it wished to punish the plaintiff for refusing to go along with the check-off, did believe it was technically on sound legal ground in requesting his termination. Likewise, it is my opinion that the plaintiff is partially at fault for his predicament because he did not pursue certain remedies which I think were available to him. He might have sought a restoration of his membership pendente lite through court order, or through N.L.R.B. action. Although counsel for plaintiff obviously feels otherwise, I do not believe that it can be assumed that the N.L.R.B. would have acted unfavorably to plaintiff had he made application to it and had all the facts been fully presented to it. What Day presented has never appeared.

Counsel for plaintiff is requested to prepare findings of fact, conclusions of law and judgment for my signature in accord with this decision. If counsel for defendants wish to object to any findings or conclusions of law, I ask that they follow Rule 52(b) I.R.C.P.

Dated this 21st day of June, 1966.

/s/ MERLIN S. YOUNG
District Judge.

APPENDIX F

District Court Memorandum Decision and Orders on Motions To Amend Findings of Fact, Conclusions of Law and Judgment

[Filed September 1, 1966]

* * * * * * * * * *

This matter is before me upon motions to amend findings of fact and conclusions of law filed by both plaintiff and defendants.

By paragraphs I, II, and III plaintiff asks the Court to award greater damages than found in my memorandum decision. The actual damages suffered by plaintiff are basically speculative in a case of this kind and at best can only be an estimate. Plaintiff dropped his earlier claims for punitive damages in his last amended complaint, a fact which I overlooked in my memorandum decision, but I presume it was done to avoid any inference that his claim is based in tort for wrongful interference with his employment. It is difficult for me to see how claims for embarrassment, discomfort, and mental distress could be considered to have been within the contemplation of the parties at the time plaintiff entered into his union membership contract. In any event, I did consider most of the elements suggested by plaintiff and did arrive at the conclusion that under all of the circumstances the difference between plaintiff's actual income and his substitute offered a fair and realistic measure of damages. Therefore, plaintiff's requested amendments I, II, III and IV are denied.

By request V plaintiff asks this Court to direct defendants to restore plaintiff to membership with full restoration of seniority in union membership from 1943. In his motion plaintiff says, "Even the N.L.R.B. awards full restoration of seniority where restoration of employment is ordered." From this, I gather that plaintiff believes that by this decision I am ordering plaintiff restored to his employment with his former employer Greyhound. If it

be so interpreted, I believe this Court would then clearly be in excess of its jurisdiction because it would be invading a field which clearly is within the exclusive jurisdiction of the N.L.R.B. and plaintiff runs head on into the "Borden" and "Perko" decisions. I do not have any jurisdiction over his employer-employee relationship in this action. It is my opinion that at most I can restore to him his union membership as of the date of its wrongful termination. In this I am attempting to follow "Gonzales" as I understand it. I therefore will deny request No. V.

By paragraph VI of his motion to amend, plaintiff seeks to strike the whole provision providing for future annual payments upon refusal to restore plaintiff to membership and to substitute a fixed sum based upon plaintiff's life expectancy and the differences in pay and retirement he might have received from Greyhound as compared to his present employer. As I indicated at the oral argument, I have concluded that the future penalty provision was an error and not authorized under the theory of "Gonzales" or any other theory of law. I will therefore deny plaintiff's requested amendment VI, but will strike Paragraph XIII from the findings of fact, the parts of conclusions of law and judgment referring to such future damages.

Plaintiff's Request VII is granted.

Considering defendants' motion to amend, I conclude that overall the record does support a finding that the union had in the past been tolerant of late dues payment and that the findings are not too far out of line in that regard; and the defendants' international officers knew of and condoned the actions of Bankhead. Therefore Paragraphs I and II are denied. I will grant Paragraph III to the extent that everything after the word "Court" in Line 5 of Conclusion I will be stricken. All other requests of defendants will be denied except that "all customs and" in Line 7 of Paragraph III of the conclusions of law will

be changed to "past." Paragraphs IV, V, and VI of defendants' motion are denied.

I have made the above amendments by interlineation on the original document. Copies of the portions which have been altered are attached for counsels' information.

IT IS SO ORDERED.

Dated this 1st day of September, 1966.

/s/ MERLIN S. YOUNG.
District Judge.

APPENDIX G

District Court Findings of Fact, Conclusions of Law and Judgment (as Amended)

[Filed September 1, 1966]

* * * * * * * * * *

The above entitled cause came on regularly to be heard before the court sitting without a jury on the 11th day of October, 1965, plaintiff appearing in person and by Samuel Kaufman of the firm of Anderson, Kaufman and Anderson, his attorneys, and defendants appearing by counsel, Isaac N. Groner, Paul T. Bailey and George A. Greenfield. Whereupon, following submission of oral and documentary evidence, counsel presented oral argument and written briefs and the court being now fully advised in the premises, makes the following Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

I

That defendant Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, hereinafter referred to as the International Association, is an organized labor association or union having as members

workmen connected in some manner with the operation of trolleys, busses and coaches, including those skilled and trained in driving the same and particularly, as concerns this case, busses owned and operated within the State of Idaho by Western Greyhound Lines, a division of Greyhound Corporation. That said International Association has its own duly elected officers acting for and on behalf of the International Association and having ultimate control and supervision over all of the members of the International Association who in turn are grouped within various regional divisions.

II

That Northwest Division 1055 of the International Association, hereinafter referred to as Division 1055, is one of the regional divisions of the International Association and includes as members thereof members of the International Association who live and work within the regional boundaries of Division 1055 which includes portions of the State of Idaho. That said Division 1055, and the officers thereof, are members of the International Association, subject to ultimate authority and control of the International Association within the framework of the constitution and general laws of the Association (Exhibit 34) to which they are all subject.

III

That the International Association, through its International officers and through officers and agents of Division 1055, and Division 1055 itself, through its officers and agents, have each conducted and are conducting business within the State of Idaho. That at various times officers and agents of both the International Association and Division 1055 are within the State of Idaho acting for and on behalf of the International Association, Division 1055 and the members thereof. That a number of members of the International Association and Division 1055 thereof live in and are basically employed within the State of Idaho

and the International Association and Division 1055 are the exclusive representatives of said members for the purposes of collective bargaining relative to conditions of employment and for negotiation and execution of contracts with employers pertaining to such matters, some of which employers are within the State of Idaho, and officers and agents of both the International Association and Division 1055 come into the State of Idaho to conduct internal union affairs and to bargain with employers on behalf of members and to negotiate contracts between employers and the union on behalf of the members of said International Association and Division 1055.

IV

That plaintiff is a man of the approximate age (at time of trial) of 51 years, married and with two children, both of whom, at time of trial had reached the age of majority. Plaintiff did not complete high school and has no educational or experience background to qualify him to do much else than drive a bus or other similar motorized vehicle and has a physical disability of the back resulting from an accident driving a bus prior to 1959, which disability curtails plaintiff's activities in other fields involving physical labor.

V

That since on or about May 16, 1943, and to and including on or about November 2, 1959, plaintiff was a member of the International Association within Division 1055 thereof and has continuously been employed as a bus driver for Western Greyhound Lines, or its predecessors. That on November 2, 1959, plaintiff had over 16 years seniority as a bus driver and under the laws of the union and the employment contract, Exhibit 35, such seniority commensurate rights and benefits in working privileges and compensation to be received therefrom. Exhibit 35 compromises actually two contracts, Contracts B and C, but the contract covering plaintiff's employment and which is

pertinent in this case is Contract B, being the approximate first half or the white pages of Exhibit 35.

VI

That on or about November 2, 1959, C. A. Bankhead, terasurer and financial secretary of Division 1055, acting in his official capacity and within the scope of his activities as treasurer and financial secretary and, under the facts presented and all reasonable inferences to be drawn therefrom, acting for the International Association and pursuant to knowledge and approval of, if not direct advice and orders from, the International Association President, and International Vice-President, and a member of the General Executive Board of the International Association, suspended plaintiff from membership in the union on the sole grounds that plaintiff was in arrears in payment of dues contrary to the requirements of the constitution and general laws of the union (Exhibit 34) and by letter dated November 2, 1959 (Exhibit 4) notified the employer, Western Greyhound Lines, that plaintiff was no longer a member in good standing in the union and requested said employer to remove him from employment. That immediately following receipt of such notice from C. A. Bankhead, the employer discharged plaintiff from employment (Exhibits 8 and 9). One Elmer Day was likewise suspended under identical circumstances.

VII

That the contract agreement (Exhibit 35), and particularly paragraph No. 3a of Section I, on page 5, requires that all employees covered by the contract become members of the association not later than 30 days following its effective date and thereafter remain members as a condition precedent to continue employment. Section 91 of the Constitution of the International Association (Exhibit 34) provides that all dues, fines and assessments are due on the 1st day of each month and must be paid by the 15th of

the month in order to continue the member in good standing. It further provides that a member in arrears after the 15th day of the month is not in good standing and not entitled to certain benefits and further, where a member allows his arrearages to run over the last day of the second month without payment, he does thereby suspend himself from membership in the association, meaning the International Association. Said Section 91 further provides that where agreement with employing companies provides that members must be in *continuous good financial standing*, the members in arrears one month *may* be suspended from membership and removed from employment. Section 93 of Exhibit 34 provides that where members are in arrears past the last day of the second month they shall, at the last meeting of each month, be reported by the financial secretary as having suspended themselves from membership except where members are suspended in compliance with the terms of agreements, the members *may* be so reported and suspended after the period of one month. That at the time of their suspension from membership in the International Association on or about November 2, 1959, plaintiff and said Day were in arrears in payment of their dues only since the 1st day of October, 1959. Additionally, it has over the years been customary within Division 1055 for members to be in arrears in their dues without being suspended, even though said arrearages exceeded 60 days, it being the custom of Division 1055 in the past, and almost without exception, to remove the delinquent member only from service rather than suspend him from union membership and immediately upon payment of his delinquent dues, put him back in service without loss of seniority. Additionally, the financial secretary of Division 1055 did not report at the last meeting prior to suspension, that plaintiff or Day were in arrears in dues.

VIII

That at the time plaintiff's wife was notified of plaintiff's suspension from union membership in early November

1959 (plaintiff was elk hunting during a vacation period) plaintiff's wife, by letter dated November 10, 1959, submitted to C. A. Bankhead, financial secretary of the Division 1055 a check to cover plaintiff's dues for both October and November but the said C. A. Bankhead refused to accept the same and the check was returned (Exhibit 5).

IX

Following his return to Boise in mid November 1959, and immediately upon learning of his suspension from union membership with resulting termination of his employment, plaintiff contacted C. A. Bankhead requesting advice as to what he could do to obtain reinstatement of his union membership and on several occasions submitted checks for his arrearages and penalties all of which were refused. On one occasion during November 1959, another driver and fellow member tendered dues for plaintiff to Bankhead who was told not to accept the same by International Vice-President Charles McCaffery. While the said Bankhead suggested to plaintiff that he write to the International President, which plaintiff delayed in doing until January 8, 1960 (Exhibit 11) said Bankhead himself wrote to the International President (Exhibit 6) requesting that the International President and/or the General Executive Board waive the provisions of Section 94 of the Constitution and reinstate plaintiff. This was not done and subsequently there evolved correspondence between Plaintiff and the International President and others (Exhibits 10, 11, 12, 13, 14, 15, 16, 17) as well as oral conversations between plaintiff and other union members on his behalf and officers of both Division 1055 and International Vice-President McCaffery.

X

That at the time of his suspension from union membership, plaintiff was 46 years of age. In 1959 he earned $5,014.38 from his employment although he did not work

the full year. Upon plaintiff's suspension from union membership, the next driver in seniority, one Francis Carter, moved up in the seniority list and in effect, took plaintiff's place on that list. The comparable earnings of said Carter and plaintiff for the period 1959 through September 15, 1965, are as follows:

Year	Carter	Plaintiff
1959	$ 6,017.57	$ 5,014.38
1960	6,750.27	489.40
1961	7,410.50	258.00
1962	7,213.63	350.00
1963	8,093.61	2,185.00
1964	8,265.59	5,000.00
1965 (Through Sept. 15)	6,185.74	3,961.50
Total	$49,936.84	$17,258.28

That during the past several years the said Carter has, by reason of his seniority, been able to bid and hold a regular run. That in addition thereto, had he chosen to do so, he could have worked what is known as the extra board, which is the customary practice of other drivers, but which Carter chose not to do for personal reasons. The evidence discloses that for the years 1963 and 1964, the said Carter working the extra board, could have earned at least $1200.00 a year more than he chose to and commencing 1965, any driver with such seniority could earn at least $10,000.00 per year.

XI

That following his suspension from union membership in November 1959, plaintiff was without steady employment until after mid 1963 when he obtained employment with the State of Idaho Highway Department which necessitated his moving from the Boise Valley to Lowman, Idaho, where he has resided since. Until his employment with the State of Idaho Highway Department in 1963, plaintiff

made many efforts to seek employment within the limits of his educational, experience and physical abilities and his lack of earnings during that period are not due to failure of effort on his part.

XII

Plaintiff's present wages with the State of Idaho Highway Department are approximately $5,300.00 per year. That in addition to a difference in earnings of approximately $4,700.00 per year, various insurance and burial benefits from employment as a bus driver considerably exceed that which are available to plaintiff as an employee of the State of Idaho Highway Department although these cannot be translated into dollars and cents. In addition, under retirement plans with Western Greyhound Lines, plaintiff would be able to retire between ages 60 and 65 with a retirement income of at least $300.00 per month and his present retirement benefits under the State of Idaho Public Employee Retirement law entitles him to approximately $50.00 per month retirement. Plaintiff's life expectancy at time of trial is approximately 23 years.

XIII

That as a result of his suspension from union membership plaintiff has suffered embarrassment, discomfort, mental anguish and humiliation and additionally a financial loss in earnings to September 15, 1965 in the sum of $32,678.56.

CONCLUSIONS OF LAW

I

That each of the defendants, International Association and Division 1055 are the proper parties defendant in this action, have done and are doing business within the State of Idaho, were duly and properly served with summons and complaint herein and are properly within the jurisdiction of this court.

II

That the Constitution and general laws of the International Association (Exhibit 34) as well as the contract agreement (Exhibit 35) are, with respect to plaintiff's requirement for paying dues and his suspension from membership in the union for failure to pay dues, clear and unambiguous in their terms. That the contract, Exhibit 35, requires only that plaintiff remain a member of the association and Section 91 of the Constitution therefore does not provide for suspension from union membership until plaintiff be arrears in his dues past the last day of the second month. That on November 2, 1959, plaintiff was in arrears in his dues only two days past the first month and his suspension from union membership was wrongful.

III

That even where employment contracts provide that the union member remain in good financial standing, as opposed to merely being a member of the union as is the requirement of Exhibit 35, suspension from union membership after 30 days delinquency is not mandatory but discretionary and any suspension of a union member for dues delinquency after 30 days violates past practice of Division 1055. That in suspending plaintiff from union membership officers of Division 1055 did not conform to the procedural requirements of the Constitution nor to the customs and practices of Division 1055 and at all times acted with knowledge and consent of, if not direct orders from, officers of the International Association.

IV

That while plaintiff might have made a better legal record of his attempts to seek reinstatement through union procedures, particularly Section 94 of the Constitution, the facts, taken as a whole, together with all reasonable inference which may be legitimately drawn therefrom, indi-

cate that any further attempts on plaintiff's part to seek reinstatement or to follow other procedures such as provided in Sections 79-81 of the Constitution, the proper application of which in this instance is doubtful, would have been useless and futile gestures.

V

The grievance procedures set forth under Section 1, paragraph 3 and following of Exhibit 35 are of no proper application in this instance and are intended to cover grievances existing between an employee and employer and not internal problems existing between the union member and the union such as in this case.

VI

That the Constitution and By-laws of the International Union constitute a contract between the union and the members thereof and in suspending plaintiff from membership in the union at a time when plaintiff was not so in arrears in his dues that he was properly subject to such suspension, and contrary to all custom within Division 1055, defendants, whose officers and agents acted in concert, violated said contract.

VII

That while the acts of defendants' officers and agents in suspending plaintiff from union membership and thereafter refusing to reinstate him were predicated solely upon the ground that plaintiff had failed to tender periodic dues in conformance with the requirements of the union constitution and employment contract as they interpreted the same, such acts were nevertheless wrongful and resulted in a wrongful interference with plaintiff's employment, occupation and livelihood and subjected plaintiff to embarrassment, discomfort, humiliation and mental anguish.

VIII

While plaintiff did not seek such remedy, he is entitled to all relief warranted by the evidence and the court concludes that plaintiff should be granted judgment for damages of $32,678.56 for loss of earnings to September 15, 1965, and for full restoration of union membership upon payment of current dues.

JUDGMENT

WHEREUPON, upon the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff do have and recover judgment against defendants, and each of them, for the sum of $32,678.56, together with interest thereon at the rate of 6% per annum until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants restore plaintiff to membership in the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, an International Labor Union and Northwest Division 1055 thereof upon his tender of current dues.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT THE plaintiff do have and recover his costs incurred herein in the sum of $365.55.

Dated this 1st day of August, 1966.

/s/ MERLIN S. YOUNG.
District Judge.

Judgment amended by the Court on Sept. 1, 1966, as shown by additions and deletions shown thereon [deleted from this printing].

/s/ MERLIN S. YOUNG.
District Judge.

APPENDIX H

Idaho Supreme Court Decision

[Filed October 15, 1969]

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 9959

Boise, November Term, 1968

* * * * * * * * * * *

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. The Honorable Merlin S. Young, District Judge.

Action by a former member of a labor union against the union for reinstatement to membership and for damages resulting from an improper discharge from membership. Judgment *affirmed, as modified, and remanded.*

McClenahan & Greenfield, Boise, Earle W. Putnam, Cole and Groner, Washington, D. C., Bailey, Swink, Haas, Seagraves and Lansing, Portland, Oregon, for appellant.

Anderson, Kaufman, Anderson & Ringert, Boise, for respondent.

SPEAR, J.

This is the second appearance of this cause before this court. See Lockridge v. Amalgamated Ass'n of St. El. Ry. & M.C. Emp., 84 Idaho 201, 369 P 2d 1006 (1962). The issue presented is the same: "Does the National Labor Relations Act pre-empt state court jurisdiction over the question of whether a union member has been improperly expelled from membership in the union for alleged nonpayment of dues in violation of the contractual relationship between the two?" Appellant union urges that seven decisions subsequent to the previous *Lockridge* decision require reversal of that decision. Appellant points particularly to Plumber's Union v. Borden, 373 U.S. 690, 10 L.Ed. 2d 638, 83 S.Ct. 1423 (1963); Iron Workers v. Perko, 373 U.S. 701, 10 L.Ed. 2d 646, 83 S.Ct. 1429 (1963); Cox's

Food Center, Inc. v. Retail Clerks U.Loc. No. 1653, 91 Idaho 274, 420 P.2d 645 (1966); and Day v. Northwest Division 1055, et al, 238 Ore. 624, 389 P.2d 42 (1964). It is the opinion of this court that the issues in this case are identical to those presented in International Assn. of Machinists v. Gonzales, 356 U.S. 617, 2 L.Ed. 2d 1018, 78 S.-Ct. 923 (1958), and as such require an affirmance of the decision below. However, since the decisions in *Borden* and *Perko* have to some extent impaired the vitality of *Gonzales,* we feel that further elaboration of the facts and law relied upon must be made and the scope of *Lockridge* limited as set forth herein.

Wilson P. Lockridge was born October 15, 1915. He had a limited education, completing his formal education at the conclusion of the 8th grade. Between the ages of approximately fourteen and twenty-two, he was employed on his father's farm. Thereafter, from 1937 until May 1943 he drove truck for a creamery. In May of 1943 respondent Lockridge went to work for Union Pacific Stages, driving a bus. At that time he also became a member of the appellant union. In 1945 Lockridge began working for Greyhound Corporation or a subsidiary thereof which acquired Union Pacific Stages. Thereafter Lockridge was continually a member of the union and employed by Greyhound until November 2, 1959. On November 11 or 12, 1959, after returning from a hunting trip, Lockridge was informed that his membership in the union had been terminated and a request had been made by the union to representatives of Greyhound that his employment be terminated. The contents of this letter, dated November 2, 1959, is set forth as follows:

"Mr. W. H. Egger, Regional Manager
Eighth and Stewart Streets
Seattle, Washington

Dear Mr. Egger:

Mr. Elmer J. Day and Mr. W. P. Lockridge are not in good standing in our Union. They have suspended

themselves from membership so in compliance with Section 3 of Contract B, I am asking that you remove them from employment.

Sincerely,

/s/ C. A. BANKHEAD
C. A. Bankhead
Financial Secretary"

At that time a contract existed between appellant and Greyhound which contained the following pertinent provision referred to in the Bankhead letter:

"3. Membership in and Recognition of the Association, Grievances and Arbitration: (a) All present employees covered by this contract shall become members of the ASSOCIATION not later than thirty (30) days following its effective date and shall remain members as a condition precedent to continued employment. This section shall apply to newly hired employees thirty (30) days from the date of their employment with the COMPANY."

The pertinent part of the Union's Constitution and General Laws, provided as follows:

"DUES, SUSPENSIONS AND REINSTATEMENTS

"Sec. 91. All dues, * * * of the members of this Association are due and payable on the first day of each month for that month, * * * * They must be paid by the fifteenth of the month in order to continue the member in good standing. * * * A member in arrears for his dues, * * * after the fifteenth day of the month is not in good standing * * * and where a member allows his arrearage in dues, fines and assessments to run into the second month before paying the same, he shall be debarred from benefits for one month after payment. Where a member allows his arrearage for

dues, fines and assessments to run *over the last day of the second month* without payment, he does thereby suspend himself from membership in this Association, • • • • Where agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with terms of the agreement." (emphasis added)

It is obvious from a reading of the materials quoted above, that Lockridge was *not* subject to suspension or dismissal from the union for non-payment of October dues on November 2, 1959. It is equally obvious that Mr. Bankhead confused Section 3 of Contract B, the only one applicable to Lockridge with Section 3 of the Contract C, which provided for suspension of members *not in good standing.*[1]

At this point it is interesting to note the results of the divergent remedies which were sought by the two suspended members. Day immediately filed an unfair labor practice charge with the N.L.R.B. Seattle Regional Office. Lockridge began petitioning the union for redress of his griev-

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[1] "3. Membership and Recognition of the Association, Grievances and Arbitration:

(a) Any employee who now is a member in good standing or who, after May 15, 1946 (after May 1, 1951, for General Acct. Dept. employees), becomes or is reinstated as a member of the Association, shall, as a condition of continued employment, maintain such membership in good standing. Any employee first hired after May 15, 1946 (after May 1, 1951, for General Acct. Dept. employees), shall, as a condition of continued employment, become on or before thirty days from the date of hiring a member of the Association and thereafter maintain such membership in good standing."

ances. Day's petition was rejected by the regional director of the N.L.R.B.[2]

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[2] "Mr. Elmer J. Day
Route 3, Box 90
Sherwood, Oregon

Re: Western Greyhound Lines
36-CA-986
Street, Elec. Railway, and Motor Coach Employees, Div. 1055
36-CB-238

Dear Mr. Day:

The above-captioned cases charging violations under Section 8 of the National Labor Relations Act, as amended, have been carefully investigated and considered.

As a result of the investigation, it appears that, because there is insufficient evidence of violations, further proceedings are not warranted at this time. I am therefore refusing to issue Complaint in these matters.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D.C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it it is based. The request must be received by the General Counsel in Washington, D.C. by the close of business on December 28, 1959. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file.

Very truly yours,

THOMAS P. GRAHAM, JR.
Regional Director"

Lockridge's appeal was rejected by the union.[3]

The basis for the Regional Director's decision is not too clear, but it is obvious that the union had terminated Lockridge's membership. On the other hand, Greyhound, by

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[3] "Dear Mr. Lockridge:

This will acknowledge receipt of your letter of January 18, 1960, requesting that I, or the General Executive Board, waive the provisions of Section 94 of the Constitution and General Laws of this organization in order that you might be reinstated to membership. Please be advised that, in my capacity as International President, I have no power to waive the provisions of the Constitution and General Laws.

Perhaps you have in mind Section 170A of the Constitution and General Laws which now provides as follows:

> 'The I.P., I.S.-T., Vice-Presidents and G.E.B. shall constitute a committee and shall have power, unless prohibited by the Labor-Management Reporting and Disclosure Act of 1959, to waive any clause of this Constitution by a three-fourths vote of this Committee, such action being binding upon the A.A. of S.E.R. and M.C.E. of A. only until the convening of the next Convention of the Association.'

The General Executive Board has ruled that Section 170A is intended to be used only in emergency situations and then only at the instance of the officers of the International Union or the General Executive Board when such situations threaten to impair the administration of the affairs of the Association or its Local Divisions. The Board has ruled that Section 170A was not intended to be available to an individual member or former member or to be a substitute for the appeal procedures of our Constitution and General Laws. Accordingly, the General Executive Board declined to process your request for waiver.

I wish to add, however, that even if I had the power to waive Section 94, I would not, on the basis of the information before me, be inclined to support your request. As I understand the facts, you were validly discharged for non-payment of dues on November 3, 1959, pursuant to the provisions of Section 3 of Contract B between Western Greyhound Lines and the Council of Western Greyhound Amalgamated Divisions and the various Amalgamated Divisions, including Division 1055. Your discharge had been requested by Division 1055, pursuant to the contract, for

letter of February 2, 1960, obviously felt obligated to withhold employment from Lockridge until his membership status in the union was restored. Thus Lockridge (and Day for that matter) could not be employed by Greyhound until restored to membership. At this point it must have been clear to both men that they would not obtain relief from either the union, the employer or the N.L.R.B. Therefore, they each turned to their respective state courts. After the jury had returned a verdict in Day's favor, the union appealed to the Oregon Supreme Court, which reversed the judgment in Day v. Northwest Division 1055, et al, 389 P.2d 42 (Ore. 1964), stating that the subject-matter had been pre-empted and that *Borden* and *Perko* were controlling. The United States Supreme Court denied review.

Appellant's position may be summarized by three contentions: (1) Congress has pre-empted all state court jurisdiction over union-member relationships since it has comprehensively regulated the field. (2) There was no unfair labor practice because Lockridge's dismissal from the union and consequently from employment was in accord with union rules and the contract and therefore was protected by the proviso to sec. 8(b)(1)(A) and sec. 8

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non-payment of dues within the time required under the Constitution and General Laws. You have offered no reasons and furnished no evidence as to why the Constitution and General Laws should be waived. Indeed, my investigation discloses that you were put on notice by the Division's letter of October 22, 1959 of the importance of paying your dues within the period required under the Constitution and General Laws. Nevertheless you thereafter failed to pay your dues as required by our laws.

I might add that in my opinion, the privilege of reinstatement under Section 94 is not available to a member discharged under Section 91 under a union security contractual provision. It is, however, unnecessary to rule on this point here.

Very truly yours,

/s/ JOHN M. ELLIOTT
John M. Elliott
International President"

(b)(2) of the National Labor Relations Act[4] and at the very least there would be no cause of action. (3) If this was not a proper dismissal in accordance with union rules and the contract, then the dismissal was in violation of 8(b)(1)(A) generally and 8(b)(2) in particular and therefore an unfair labor practice. In other words, a union cannot, first of all and in general, impair the right of an employee to either join or refrain from joining a union, in violation of 8(b)(1)(A) and, second of all, in particular, a union cannot cause the employer to discriminate against an employee by having the former terminate the latter's employment for some reason other than non-payment of regular dues, in violation of 8(b)(2). The union then argues that since the trial court found Lockridge *had* paid his dues on time the union necessarily committed an unfair labor practice. Therefore, since San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959) held that conduct which was arguably an unfair labor practice was pre-empted, the union's conduct in this case being certainly an unfair labor practice must be pre-empted. We shall deal with each of these contentions in order.

(1) There is total pre-emption of the field.

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[4] "(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;" (29 U.S.C. § 158(b)(1); 29 U.S.C. 158(b)(2)).

This proposition is not true. Appellant's argument on this point sweeps with too wide a broom. We find under part (3) hereinafter that this court has jurisdiction over the particular subject matter of this particular suit, and it necessarily follows that the broad proposition of total pre-emption, which appellant argues here, is not valid.

(2) This was a proper dismissal and therefore protected activity.

This argument, too, can be summarily dismissed because appellant has conceded on this appeal that it did not dismiss respondent in accordance with either union rules or the contract with Greyhound. Furthermore, appellant did not seriously contend otherwise in the court below since its arguments were almost exclusively directed toward the court's jurisdiction with respect to service of process and subject-matter jurisdiction. Finally, it is readily apparent, on the basis of those portions of the labor contract and the union constitution hereinbefore cited, that this is a position which is untenable. The trial court so found [5] and no appeal was taken therefrom.

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[5] (Finding of Fact VII). "That the contract agreement (Exhibit 35), * * * requires that all employees covered by the contract become members of the association not later than 30 days following its effective date and thereafter remain members as a condition precedent to continued employment. Section 91 of the Constitution of the International Association (Exhibit 34) provides that all dues, fines and assessments are due on the 1st day of each month and must be paid by the 15th of the month in order to continue the member in good standing. It further provides that a member in arrears after the 15th day of the month is not in good standing and not entitled to certain benefits and further, *where a member allows his arrearages to run over the last day of the second month without payment, he does thereby suspend himself from membership* in the association, meaning the International Association. * * * That at the time of their suspension from membership in the International Association on or about November 2, 1959, plaintiff and said Day were in arrears in payment of their dues only since the 1st day of October, 1959. * * * "

(3) This was an unfair labor practice and therefore pre-empted.

This brings us, then, to appellant's most serious argument. At the outset, we concede much of what appellant argues. Appellant, in the opinion of this court, did most certainly violate 8(b)(1)(A), did most certainly violate 8(b)(2) (i.e., see Krambo Food Stores, Inc., 114 N.L.R.B. 241 (1955)) and probably caused the employer to violate 8(a)(3),[6] all of which constitute unfair labor practices, all of which are subject to the exclusive cognizance of the National Labor Relations Board and are *not* subject to adjustment by, or interference with, Idaho courts. However, in addition to at least three unfair labor practices appellant did commit a breach of the contract between itself and W. P. Lockridge, a member. That contract provided that Lockridge would have continued membership in his union so long as he paid his dues no later than the end of the

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[6] "Sec. 8(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section [9(a)] * * *; *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;" (29 U.S.C. § 158(a)(3))

second month after they became due. None of the cases cited by appellant stands for as broad a proposition as that for which appellant contends. Preemption is not established simply by showing that the same facts will sustain two different legal wrongs. This would be analogous to precluding a contract action by proving the facts also establish a tort. The conflict to be avoided is two different bodies, analyzing the same facts, reaching the same or different interpretations of those facts and apply [*sic*] conflicting remedies. In this case, as will be pointed out later, the conflict between this court and the N.L.R.B., if extant, is not significant and the result we reach is consistent with the underlying policy of the national labor legislation.

Of course, it is not enough to simply state that this is an internal union matter. The "internal union matter" must be of a particular nature. The suit must be limited so that it focuses "on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought [must be] restoration of union membership rights." Plumbers Union v. Borden, 373 U.S. 690 at page 697; International Assn. of Machinists v. Gonzales, 356 U.S. 617. From the outset respondent attempted to regain his membership. This is the import of all his correspondence with the union. The only record of contact with the employer are the two letters from Greyhound informing him of his termination. The only relationship his employment has to this case is a means by which damages can be computed. The complaint upon which this cause was finally submitted was that Lockridge was wrongfully deprived of *membership*. By his complaint he sought damages *and* equitable relief. His prayer for equitable relief was framed in general terms and this court concludes that in this case or any other within the narrow area where we can assert jurisdiction to relieve

wrongfully denied membership, the primary relief which can and shall be granted is restoration of union membership. Damages, if any, are a secondary consideration, and shall be limited to compensation for damage suffered until such time as membership is restored.

Restoration of union membership is not a remedy which the N.L.R.B. can afford. International Assn. Machinists v. Gonzales, supra. Under the law of Idaho, membership in a labor union constitutes a contract between the member and the union. Lockridge v. Amalgamated Ass'n of St. El. Ry. & M.C. Emp., 84 Idaho 201, 370 P.2d 798 (1962). Our decision in this case is designed solely to give "legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein' ". International Assn. Machinists v. Gonzales, 356 U.S. at page 620. The purpose for which we exercise jurisdiction is to avoid leaving "an unjustly ousted member without remedy for the restoration of his important union rights." "Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act." *Gonzales,* 356 U.S. at page 620.

As previously pointed out, there may have been violations of the Act, but the Board in such a case would focus on the union-employment relationship and order restoration of employment. The Board's power to make such an order and determination precludes any such determination by this court or any interference by the court with the employee-employer relationship. However, the Board cannot restore membership in the union; this court can. *Gonzales,* supra. Also, the National Labor Relations Board could not give respondent the relief that Idaho law can give him according to our local law of contracts and damages. Additionally, the possibility of partial relief from the Board does not, in such a case as is here presented,

deprive a party of available state remedies for all damages suffered.

> "If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8(b)(2). This important distinction between the purposes of federal and state regulation has been aptly described: 'Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands-off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference

to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms.' Isaacson, Labor Relations Law: Federal versus State Jurisdiction, 42 A.B.A.J. 415, 483." (International Assn. Machinists v. Gonzales, 356 U.S. pages 621 through 623.)

This, then was the state of the law and its application to this case at the time of the *Gonzales* decision. However, appellant insists that this decision is altered by subsequent cases.

The landmark case, cited as the genesis of the trend limiting *Gonzales,* is San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959). *Garmon* was written by Justice Frankfurter, author of the *Gonzales* decision. The case itself arose out of a recognitional dispute between two unions and an employer. It involved conduct which represented one of the vital tools of organized labor and a protected right for all employees—picketing. The parties disputed over whether the picketing was unprotected coercion or protected publicity. The N.L.R.B. declined jurisdiction. California courts asserted jurisdiction because the Board had declined to do so and then the state courts enjoined the picketing. Justice Frankfurter, in reversing the state court decision, began by quoting from Weber v. Anhauser Busch, Inc., 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546 (1955):

"'By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the

> operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v. Teamsters Union, supra [346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228]. But as the opinion in that case recalled, the Labor Management Relations Act "leaves much to the states, though Congress has refrained from telling us how much." 346 U.S. at page 488, 74 S.Ct. at page 164. This penumbral area can be rendered progressively clear only by the course of litigation.' " 359 U.S. at page 240.

Justice Frankfurter then expanded on these basic considerations:

> "We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018.

> Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction we could not infer that Congress had deprived the States of the power to act." 359 U.S. at pages 243-44.

The central rule of the case was then reached, in the following language:

> "When it is clear or may fairly be assumed that the activities which a State purported to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8 due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." 359 U.S. at page 244.

In applying this rule to the facts it was pointed out that the particular conduct sought to be regulated was assumed to be, and was treated as, an unfair labor practice.

> "The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the Act." 359 U.S. at page 245.

The court concluded that it did not matter whether this was protected or prohibited activity, or even whether the Board asserted jurisdiction. The issue, then was, was this a *class or type* of conduct which was *arguably* subject to the Board's cognizance, which by their administration and promotion of the policies of the act could best be handled?

Was there "uncertainty" as to whether an act or practice would be protected or not?

The distinction between the type of conduct in *Garmon* and the type of conduct here is clear. The former involved the most fundamental aspects of concerted action, the very heart of the national labor policy, over which the regulatory power of the Board has never been questioned. Here the conduct centers on membership rights in the union, critical from an individual member's viewpoint, but conduct, excluded from the operation of the act. The remedy sought here does not impair the assertion of collective rights but rather, guarantees the availability of those collective rights to individual members. As can be no more clearly presented than by the facts in this case themselves, if this court did not assert jurisdiction, respondent would never regain his union membership.

Appellant, however, insists that the "arguably subject" test is the one which now applies to this class of cases, citing Plumber's Union v. Borden, 373 U.S. 690, 10 L.Ed.2d 638, 83 S.Ct. 1423 (1963), and Iron Workers v. Perko, 373 U.S. 701, 10 L.Ed.2d 646, 83 S.Ct. 1429 (1963). However, Justice Harlan, in those cases specifically distinguished the situations presented there from *Gonzales* and he pointed to many important policy questions involved in those cases which were more properly to be decided by the Board.

Borden and Perko never sought reinstatement in the union. *They had never been denied their membership.* In both cases the individuals complained that they had been denied the benefits of a *particular* job. Borden wanted to work for a particular employer and was, for apparent disciplinary reasons, refused a necessary referral by the union. Perko complained that he was not able to work as a foreman or superintendent. The court said of Perko:

> "As in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or

prospective employment relations *and was not directed to internal union* matters." 373 U.S. at page 705 (emphasis added)

Furthermore, *Borden* involved "difficult and complex problems inherent in the operation of union hiring halls" while *Perko* presented "difficult problems of definition of status and coercion * * * of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole."

The result we reach is contrary to that reached in Day v. Northwest Division 1055, et al, 389 P.2d 42 (1964). However, in *Day* there is a specific finding of discrimination on the part of the union. In light of such a finding an unfair labor practice would be established. There was no such finding in this case and the conclusion of the court below is one amply supported by the evidence and one in which we concur. This was a misinterpretation of a contract. Whatever the underlying motive for expulsion might have been, this case has been submitted and tried on the interpretation of the contract, not on a theory of discrimination. The fact that the Board might go deeper into the union motivation and discover an unfair labor practice simply serves to point up the distinction between the facts we focus upon and those which the Board would focus upon. That the Board might find an unfair labor practice in both an underlying "discriminatory" motivation and an honest misunderstanding of the contract, is simply a determination which is necessary to establish the Board's jurisdiction and its power to enforce the remedies within its cognizance.

However, aside from this distinguishing point in *Day*, we also believe that the majority there took too shallow a view of the case law and pertinent legislation. Rather, we believe the opinion of Justice Perry, dissenting, to be the better reasoned.

After the trial on the merits, the trial court made certain findings of fact to which appellant has made no assignments of error on appeal and therefore such findings are necessarily binding on this court. Among such findings are the following:

> "That on November 2, 1959, plaintiff [respondent herein] had over 16 years seniority as a bus driver under the laws of the union and the employment contract, and such seniority commensurate rights and benefits and working privileges and compensation to be received therefrom.
>
> "That on or about November 2, 1959, C. A. Bankhead, treasurer and financial secretary of Division 1055, acting in his official capacity and within the scope of his activities as a treasurer and financial secretary and, under the facts and reasonable inferences to be drawn therefrom, acting for the International Association and pursuant to the knowledge and approval of it, if not direct advice or ordered from, the International Association president, and International vice-president, and a member of the general executive board of the International Association, suspended plaintiff from membership in the union *on the sole grounds that plaintiff was in arrears in payment of dues contrary to the requirements of the constitution and general laws of the union,* and by letter dated November 2, 1959 notified the employer Western Greyhound Lines that plaintiff was no longer a member in good standing in the union and requested said employer to remove him from employment. That immediately following receipt of such notice from C. A. Bankhead, the employer discharged plaintiff from employment. One Elmer Day was likewise suspended under identical circumstances. (emphasis added)
>
> "That at the time plaintiff's wife was notified of plaintiff's suspension from union membership in early

November, 1959 (plaintiff was elk hunting during a vacation period) plaintiff's wife, by letter dated November 10, 1959, submitted to C. A. Bankhead, financial secretary of the Division 1055 a check to cover plaintiff's dues for both October and November but the said C. A. Bankhead refused to accept the same and the check was returned (Exhibit 5).

"Following his return to Boise in mid November, 1959, and immediately upon learning of his suspension from union membership with resulting termination of his employment, plaintiff contacted C. A. Bankhead requesting advice as to what he could do to obtain reinstatement of his union membership *and on several occasions submitted checks for his arrearages and penalties all of which were refused.* (emphasis added) * * * "

The trial court additionally found that section 93 of the union constitution provided:

"that where members are in arrears past the last day of the second month they shall, at the last meeting of each month, be reported by the financial secretary as having suspended themselves from membership except where members are suspended in compliance with the terms of agreements, the members *may* be so reported and suspended after the period of one month. That at the time of their suspension from membership in the International Association on or about November 2, 1959 plaintiff and said Day were in arrears in payment of their dues only since the first day of October 1959."

As previously mentioned in this opinion, no appeal has been perfected from any of the findings of fact. Additionally, on the basis of what respondent's replacement, a man named Carter, actually earned in the years 1959

through September 15, 1965, in the same employment which respondent had prior to his unlawful suspension by the union, the court found that during that period respondent had suffered a loss in earnings of approximately $32,678.56, i.e., the difference between what he would have earned at his regular employment as a bus driver and what he did earn as an employee of the Highway Department of the State of Idaho, and on that basis the trial court awarded respondent damages for loss of wages in the sum of $32,678.56. In the judgment the trial court further decreed that the respondent be restored to membership in the union upon tendering payment of his current dues.

As it was first rendered and filed, the judgment also provided that respondent should be restored to his seniority rights. However, upon motion to amend the findings of fact, conclusions of law and judgment, the trial court, after hearing thereon, struck from the decree and from the findings and the conclusions such restoration of seniority rights and also a provision allowing the respondent the sum of $3,500 per year in damages from the union from and after September 15, 1965 until he had been restored to membership and full seniority rights. This is the state of the judgment from which the appeal was taken on the three contentions by appellant, disposition of which has already been made.

Respondent by way of cross-appeal raised several issues, the most important of which is that of restoration of seniority rights. In order to grant respondent the full equity to which he is entitled, in addition to the money damages awarded him by the trial court, he must necessarily be restored by the appellant union to full seniority rights. The trial court, therefore, was in error, in striking from the findings of fact and conclusions of law and the judgment the restoration of such rights, upon motion of appellant. Upon remanding of this cause the trial court is hereby ordered to restore these rights of seniority to respondent.

Respondent additionally contends that the trial court erred in not awarding damages in the amount of overtime compensation which Lockridge could have worked. The trial court was the finder of facts and since the court was not convinced that Lockridge could or would have worked the overtime in question, this portion of the judgment is affirmed.

Finally, respondent prayed for damages of $50,000.00 for discomfort, embarrassment, humiliation and mental anguish and the trial court specifically found that such elements did exist from the facts adduced at the trial but omitted to ward any sum for such damages. Respondent assigns this as error. Such damages must necessarily be based upon mental suffering and the attempt to recover them from a breach of contract has generally been met with disfavor by the courts. Denial of damages is based upon several grounds, e.g., remoteness of the injury from the breaching act; lack of an adequate standard or measure of such damages; the danger of speculative and easily simulated injuries which would be difficult to disprove; and the inevitable fear of increased litigation. There is a growing tendency to consider mental damages as a proper element in these actions just as in actions sounding in tort; but this is definitely a minority viewpoint, and we choose to adhere to the majority holdings which deny such recovery. See 32 Notre Dame Lawyer 482. Thus the trial court committed no error in not awarding such damages to respondent.

In thus disposing of the various contentions of the parties we reach a decision which, rather than conflicting with federal labor policy, seeks to strengthen an underlying philosophy of that policy, i.e., one is entitled to gainful employment and the fruits of collective bargaining; and this is so, regardless of the employee's attitude toward the union or his failure to cooperate with a certain union policy—such as the automatic checkoff—with which he

personally disagrees. The policy considerations behind this decision do not militate against the discipline which is necessary to preserve the goals of concerted action, but rather militate in favor of the basic purpose for which national labor law was created: to provide the workingman with a fair share of the fruits of his labor.

Judgment affirmed, as modified, and remanded for restoration of respondent's seniority rights in the union, such judgment further reserving to respondent the right to petition the district court for final determination of damages for loss of earnings accruing since September 15, 1965. Costs to be shared by the parties as agreed in the instrument dated October 17, 1966.

McFadden and Donaldson, JJ., and Scoggin, D.J., concur.

McQuade, J., dissenting.

The majority today reaches a position which is, perhaps, tenable as a matter of pure logic.[1] I cannot, however, agree with them that it is the law. They attempt to fit this case within the too-narrow "internal union matter" exception to the doctrine of federal pre-emption in labor law. That niche is entirely too small to accommodate this particular action. Although this ground has been plowed here before,[2] a recapitulation of the United States Su-

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[1] *See* Michelman, *State Power to Govern Concerted Employee Activities*, 74 Harv.L.Rev. 641 (1961). Professor Michelman, in that thoughtful if not wholely realistic article, observed: "The more state courts are hemmed in by sweeping pre-emption rules which prevent them from reaching a sensible decision on the facts of a particular case, the more they are likely to struggle to evade or to avoid the rules. The disposition of difficult cases may not be greatly facilitated, and there will be some compulsion to a kind of lawlessness in the federal system which cannot be effectively policed." *Id.*, at 683. That observation applies acutely to this case.

[2] Cox's Food Center, Inc. v. Retail Clerks Union, Local No. 1653, 91 Idaho 274, 420 P.2d 645 (1966).

preme Court cases, and the principles which may be derived therefrom, may serve to indicate more precisely the errors upon which the majority opinion is founded.

For over a decade prior to 1959, the Supreme Court sought delicately to adjust the relationship of state and federal powers in the area of labor adjudication in order optimally to serve the competing purposes of the national labor legislation and the values of our federal system. Although that process contributed greatly to the confusion with which we are involved in this case, a recapitulation of a few of the leading cases of that period will serve to explicate the full scope of the pre-emption doctrine announced in San Diego Building Trades Council v. Garmon.[3]

The first of the important cases was Garner v. Teamsters Union,[4] which involved an attempt to induce the State of Pennsylvania to enjoin picketing which was fairly clearly a matter for the N.L.R.B. In the course of an opinion holding the dispute not to be a proper object of state jurisdiction, a number of elements, thought to be important in pre-emption cases were discussed. That case was distinguished from those involving injurious conduct which the National Labor Relations Board had no express power to prevent and which was, therefore, either "governable by state law or it is entirely ungoverned." And the case was found to be one not involving mass picketing or threats to the public peace and safety and, therefore, a "local matter."

In *Garner* there were three principles upon which the affirmative holding of pre-emption was founded. The first was the oft-repeated theory that the very core of the pre-emption doctrine was a conflict of remedies. Justice Jackson seemed to mean that if a state court would pro-

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[3] 359 U.S. 236 (1959).

[4] 346 U.S. 485 (1953). The labor law pre-emption theory dates at least back to Hill v. Florida, 325 U.S. 538 (1945).

vide a sanction for conduct which was subject to N.L.R.B. cognizance when the federal tribunal would not allow such a sanction, then there was a "conflict between state and federal remedies." This actually seems to mean that the conflict to be avoided is between differing substantive standards of primary and not remedial law, but Justice Jackson phrased it in terms of remedies and that phrasing was very important until *Garmon*, six years later. The second principal leg for *Garner* was that the federal labor law plan not only comprehended a set of new rules, but also a new tribunal, with its own procedure and system of remedies; this was a comprehensive system of regulation, interference with any part of which was likely to damage the entire fabric. "A multiplicity of tribunals and a diversity of procedures are quite as likely to produce incompatible or conflicting adjudications as are different rules of substantive law." And the final leg for the *Garner* decision was a corollary to the other two. It was that, when a matter was subject to the invocation of the federal labor law, the congressionally devised Labor Board had primary jurisdiction to interpret the substantive law expertly and uniformly.

The next key case was United Construction Workers v. Laburnum Constr. Co.[5] This case involved a series of riotous attempts by a subsidiary union of the United Mine Workers to organize some A.F.L. employees of a building contractor who happened to have a job in coal-mining country. The state court tort judgment was upheld by the United States Supreme Court as not preempted. In so holding that Court assumed that the conduct involved constituted an *unfair* labor practice. The *Garner* case was distinguished therein, because in that case Congress had provided a preventive remedy exactly parallel to that which the state court was asked to impose. *Laburnum*, it was said, involved no such conflict of remedies because "Con-

[5] 347 U.S. 656 (1954).

gress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." Pre-emption was, thus said to turn on whether or not the N.L.R.B. could give the same relief which the state sought to provide. Justice Douglas filed a dissent in *Laburnum*.[6] It was his position that the federal law was a comprehensive system of rules, procedures and remedies which was designed to avoid disruptions of commerce by bringing labor disputes to orderly and rapid conclusions. The provision of an alternative, lucrative state court remedy would upset this delicate balance and cause controversies to live long in the courts, depriving the federal scheme of its healing effects and keeping old wounds open.

Following *Laburnum*, the next case which attempted further to elucidate the theoretical underpinning of pre-emption was Weber v. Anheuser-Busch, Inc.[7] In that opinion, holding that a state anti-trust law injunction would not lie, Mr. Justice Frankfurter reiterated the *Garner* theory of primary jurisdiction to decide what was prohibited and what protected and the notion that the crux of the pre-emption matter was the conflict of remedies. *Garner* was, thus, said to turn on the fact that there were "two similar remedies, one state and one federal, brought to bear on precisely the same conduct." And it was on this ground that the *Laburnum* case was distinguished, "the violent conduct was reached by a remedy having no parallel in and not in conflict with, any remedy afforded by the federal Act." While much of this still sounded as if a conflict of primary rules was the difficulty, the reference to *Laburnum* only served to emphasize that it was competition among remedies which was considered crucial. *Weber* finally declared that it did

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[6] 347 U.S. 656 at 671.

[7] 348 U.S. 468 (1955).

not matter that the state power was invoked to serve some regulatory purpose other than the ordering of labor relations. The pre-emption doctrine protected the N.L.R.B.'s primary jurisdiction to characterize and remedy conduct. Competition with that competence from state tribunals was not to be countenanced on any theory.

The final pre-*Garmon* cases which are important here are the *Gonzales*[8] and *Russell*[9] cases wherein the court was again able to hold no pre-emption. These two cases might be said to have represented the high-water mark of concurrent state jurisdiction in labor law. The *Russell* case involved a very ambiguous fact situation stemming from conduct which was either very nearly as egregious as that in *Laburnum* or else no more disorderly than might be expected in any tense, major strike. In upholding an award of exemplary and compensatory damages (as compensation for lost wages during the strike) the United States Supreme Court further muddied the waters. Where *Garner* had rejected a distinction between actions to vindicate public rights from those to compensate private rights and where *Weber* had rejected the notion that there was a relevant distinction between state general law and state labor law, the *Russell* case seemed to go in exactly the opposite direction. Although there was an N.L.R.B. remedy which exactly duplicated the compensatory damages for lost wages, the *Russell* opinion held that there was no conflict of remedies. This, it was reasoned, was because the principles which supported the state court action were private principles of general law, while those underlying the N.L.R.B. action were designed to vindicate public rights and "to effectuate the purposes of the Federal Act." Therefore, it was said, precisely the same sanction directed

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[8] International Association of Machinists v. Gonzales, 356 U.S. 617 (1958).

[9] Automobile Workers v. Russell, 356 U.S. 634 (1958).

at precisely the same conduct (and justified by findings of a non-expert, non-federal tribunal) did not constitute a conflict of remedies. After *Russell* it could reasonably be said that general state tort law sanctions could be freely directed at labor relations activity which, based upon state court findings of fact, was not protected by federal law.

Gonzales, upon which the majority relies so heavily, was decided on the same day as *Russell.* It was a California contracts case in which a union member, who claimed to have been wrongfully expelled from his union, was ordered reinstated and given damages for lost wages as well as for mental and physical suffering caused by the union's breach of contract. Justice Frankfurter, again writing for that Court, admitted that there might be an unfair labor practice made out by the facts, but preferred to characterize the action solely as one giving effect to a union member's rights without reference to extra-union employment or labor relations factors. This was so even though the damages given closely paralleled the award which the National Labor Relations Board could have imposed if it had found an unfair labor practice. The possibility of conflict with national labor policy was, for no articulated reasons, said to be "too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member." [10] This conclusion, which in terms of legal and logical argument was mere *ipse dixit* was "emphasized" by an examination of [the] way in which the lower courts and the parties characterized the action. It was a contracts action and, therefore, it served "internal" purposes. If it had been a labor law case, presumably it would have been "external" and pre-empted. Justice Frankfurter's examination of the theory of the pleadings

[10] 356 U.S. 617, at 621.

to establish the distinction between the state's focus on internal union matters and the national focus on external labor relation matters smacks somewhat of the aridity of the ancient forms of action.

After 1958 it might readily be concluded that there was a wide area of activity, or cases, or remedies which were solely the province of the National Labor Relations Board. And, especially after *Gonzales* and *Russell,* it could be as well concluded that there was as wide an area which was subject to the concurrent jurisdiction of the state and national tribunals. There was not, however, any well-evolved set of clear principles which could be applied to determine into which category a given case might fall. As we pointed out the first time that Mr. Lockridge's litigation was before us the law in the area was confused and unsettled.[11] The various cases seemed each to announce a new rationale repugnant to the last. The difficulty, as the justices had never ceased to mention and as professor, and later solicitor general, Cox had early pointed out, was that Congress had never delineated the boundaries of the two jurisdictions.[12] The Supreme Court had attempted to fill this breach by statutory interpretation which was based on the assumption that there had to be some, but not much, concurrent state jurisdiction.[13] Professor Cox had rightly warned that this allowance of simultaneous jurisdiction over the same matter would ultimately lead to excessive litigation and confusion as every point of state law would ultimately have to be passed

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[11] Lockridge v. Amalgamated Ass'n of St. El. Ry. & M. C. Employees, 84 Idaho 201, 208, 369 P.2d 1006 (1962).

[12] *See* Cox, *Federalism in the Law of Labor Relations,* 67 Harv. L.Rev. 1297 (1954).

[13] *Compare* International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), and Garner v. Teamsters Union, 346 U.S. 485 (1953), *with* Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957).

on by the United States Supreme Court.[14] That Court's effort to draw the jurisdictional boundaries according to sensitive, subtle judgments about the relative positions of the competing state and national interests through a process of "litigating elucidation" on a case by case basis had, as we have seen, come a cropper. The justices had simply been unable to state coherently what the controlling considerations were. Some of the supposed "principles," especially the notion of conflict of remedies, seemed to be tenuously related to considerations of national labor policy at best. It was this background against which the strict, even "wooden" rule of the *Garmon* case stands so starkly. A careful reading of *Garmon* indicates that in it, the majority of the Supreme Court, led again by Justice Frankfurter, embarked on a new course departing substantially from the line of decisions which preceded it.

The majority opinion in San Diego Building Trades Council v. Garmon[15] began by describing the difficult process of attempting to give meaning to a statutory framework which was vague, poorly foreseen or utterly unperceived as a process of "giving application to congressional incompletion." This complaint of congressional inactivity was followed by a plea that, if a better and more sensitive demarcation than that provided by the courts was wished, it was up to the Congress to draw better and more precise boundaries by enactment. This suggested action, echoing Professor Cox's argument made five years before, if it had been acted upon by the National Congress, might well have saved the parties and the courts of Idaho most of the time and money expended in litigating the jurisdictional question in this case.

Having concluded that the legislature had not given the courts much guidance, Justice Frankfurter explicitly

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[14] Cox, *supra* note 12, at 1315-1317.

[15] 359 U.S. 236 (1959).

disavowed the attempted, subtle, case-by-case decisional process of the preceding decade.

> "The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause." [16]

This is directly at war with the spirit of "elucidating litigation" which had animated the previous cases. But, if this were not enough, the point was emphasized as Justice Frankfurter began to review the law derived from the cases. Not all reasoning in them was of determinative importance, and much of the language used in the past did not articulate the principles upon which the decisions rested:

> "We state these principles in full realization that, in the course of a process of tentative, fragmentary illumination carried on over more than a decade during which the writers of opinions almost inevitably, because unconsciously, focus their primary attention on the facts of particular situations, language may have been used or views implied which do not completely harmonize with the clear pattern which the decisions have evolved." [17]

And, in any event, the process of elucidation was now over, and the court was going to state the correct rules to decide cases based on a decade's experience. *Garmon* was clearly and consciously meant to strike a new course.

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[16] 359 U.S. 236, at 242.

[17] 359 U.S. 236, at 241.

But a new course as to what? The majority in today's opinion would restrict *Garmon* to cases involving picketing. Justice Frankfurter's words, however, do not support that conclusion. The issues decided by the *Garmon* case were framed as broadly as possible.

> "The case before us concerns one of the most teasing and frequently litigated areas of industrial relations, the multitude of activities regulated by §§ 7 and 8 of the National Labor Relations Act. * * * The extent to which the variegated laws of the several states are displaced by a single, uniform, national rule * * *." [18]

There was no broader way to frame the issue in the case. When a justice as experienced, precise and lawyer-like as was Justice Frankfurter so obviously chooses to have a case cover the most ground possible, we can only conclude that the decision to be doctrinaire was purposeful.[19]

Having clearly indicated that *Garmon* was to state a new rule for the entire catalogue of labor law pre-emption cases, the opinion went on to state the salient considerations which underlay the new doctrine.

> "The unifying considerations of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency armed, with its own procedures and equipped with its specialized knowledge and cumulative experience." [20]

Citing *Garner*, the court also noted that the N.L.R.B. had as an expert tribunal, primary jurisdiction over questions

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[18] 359 U.S. 236 at 241.

[19] *See* Currier, *Defamation in Labor Disputes: Preemption and the New Federal Common Law*, 53 Va.L.Rev. 1, 2, 7-14; Michelman, *supra* note 1, at 648.

[20] 359 U.S. 236 at 242.

within its competence.[21] And, most importantly, the court referred to the completeness of the federal regulatory scheme, the dense interrelationship between the rules, the administrative process, the expert agency and the remedies. Therefore pre-emption was necessary whenever this delicate and purposeful national law system might be encroached upon in any way.

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 * * * [or prohibited by] § 8 due regard for the federal enactment requires that state jurisdiction must yield."[22]

And, because it is often not clear when matters are subject to either section or are meant to be utterly unregulated and because the pre-eminent principle is complete respect for the federal scheme,

> "When an activity is arguably subject to § 7 or § 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference is to be averted."[23]

The governing consideration was the necessity of absolute avoidance of even potential interference with federal labor policy.

There were only two narrow exceptions allowed to this rule of practically total pre-emption. The first was con-

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[21] 359 U.S. 236 at 242-243, 244. The doctrine of primary jurisdiction, originally designed to protect the uniformity of Interstate Commerce Commission rules, has turned chiefly on the alleged expertness of federal administrative bodies in recent years. L. Jaffe, Judicial Control of Administrative Action 121-151 (1965).

[22] 359 U.S. 236 at 244.

[23] 359 U.S. 236 at 245.

duct which breached or threatened to breach the public peace. The *Laburnum* and *Russell* cases were limited in their holdings to this narrow rule. The second exception was conduct which was of only "peripheral concern" of the Act. *Gonzales* was the only case cited for this last proposition.

And, finally, *Garmon* rejected much of the reasoning in the old cases. Remedies, conflicting or otherwise, were no longer determinative. The language about conflicting remedies in *Laburnum* was explicitly rejected. It was conduct alone which was regulated. If the conduct *even arguably* came within the scope of the national policy, all adjudication about it had to be commenced in the N.L.R.B. Also the distinctions between general laws and specific labor regulation, or those based on the characterizations of the parties, juries, or state tribunals were not of importance. It was, again, state regulation of conduct—no matter on what theory—which was to be avoided. If the activities which inspired the litigation were even arguably among those which had been entrusted to the judgment of the expert National Labor Relations Board for application of the comprehensive scheme of federal rights and remedies, then jurisdiction was solely in the national board. Any intervention in such areas by the inexpert state courts, even if the Board would not, in its discretion, choose to rule on the merits, was absolutely prohibited by *Garmon*.

The *Garmon* case, thus, represents a watershed in the jurisprudence of pre-emption. It purported to be and was a complete break with the decisions in the past. It stated a simple, omnibus rule: if conduct was even arguably subject to adjudication by the expert National Board it was ungovernable by state power. It narrowed the permissible scope of state jurisdiction to conduct which threatened good order or which was utterly irrelevant to national policy. And it foreclosed recourse to the con-

fused jumble of cases out of which it was born. It was now to be the rule in *Garmon's* case which was to control. The preceding cases had vitality only to the extent allowed them by *Garmon*. The rule was intentionally crude, even "wooden", because it was, at least in part, designed to provide a "bright line" for deciding jurisdictional issues and, thereby, to cut off the cascade of state court litigation which the cases through *Russell* and *Gonzales* threatened to inspire.[24] It is possible that in declaring this unsubtle rule in reaction to the confusion of the preceding decade, the Supreme Court of the United States was guilty of throwing out the baby with the bath water. But even if that is so, under the Supremacy Clause this court has no choice but to follow that lead. *Garmon* is absolutely the controlling case.

While it was not perfectly clear that *Garmon* was the determinative decision when this case first came before this Court over seven years ago, it is now indisputable. In the ten years since the *Garmon* decision the cases in the United States Supreme Court[25] and in the state courts[26] which recognize the supremacy of the rule in that case are legion. The most important among these for our purposes are the *Borden*[27] and *Perko*[28] cases which

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[24] Currier, *supra* note 19, at 7-14; Michelman, *supra* note 1, at 648; Updegraff, *Preemption, Predictability and Progress in Labor Law*, 17 Hastings L.J. 473, 484-485.

[25] *E.g.*, Marine Engineers Beneficial Ass'n v. Interlake Steamship Co., 370 U.S. 173, (1962); Hanna Mining Co. v. Dist. 2, Marine Engineers Ben. Ass'n, 382 U.S. 181 (1965).

[26] *E.g.*, Cox's Food Center, Inc. v. Retail Clerks Union, Local No. 1653, 91 Idaho 274, 420 P.2d 645 (1966); Day v. Northwest Division 1055, 389 P.2d 42 (Ore., 1964); Fullerton v. International Sound Technicians, 194 Cal.App.2d 801, 15 Cal. Rptr. 451 (1961); and cases cited in Currier, *supra* note 19, at 2 n. 7.

[27] Local 100 of United Ass'n of Journeymen and Apprentices v. Borden, 373 U.S. 701 (1963).

[28] Local No. 207, International Ass'n of Bridge, etc., Iron Workers v. Perko, 373 U.S. 701 (1963).

the majority attempts, unsuccessfully, to distinguish from *Lockridge*. Those cases did not turn on the fact of membership or non-membership in the defendant union. The touchstone in each of those cases was a denial of the rights of a union member which effectively caused that member to be deprived of employment which he otherwise had. The form or theory of the pleadings, whether the action sounded in contract or in tort or was a hybrid labor relations case did not matter. After *Garmon* the key to analysis, when pre-emption is urged, is the character of the *conduct*. In *Borden* and *Perko* the court catalogued the ways in which the conduct complained of could "reasonably" arguably have been characterized by the expert National Labor Relations Board as either § 7 or § 8 *conduct*. This discussion, required for decision after *Garmon*, is what the majority refers to when it says "Justice Harlan * * * pointed to many important policy questions involved in those cases which were more properly to be decided by the Board." That lengthy treatment is not needed in this instance; the majority concedes that the *conduct* complained of did indeed constitute an unfair labor practice. Following *Borden* and *Perko* and *Garmon*, that concession is all that is needed; the conduct is § 8 activity; jurisdiction is, therefore, pre-empted.

The majority, however, attempts to rely on the "distinction" which Justice Harlan drew between the *Borden* and *Perko* cases and *Gonzales*. The *Gonzales* case was different because, according to Justice Harlan, it "turned on the Court's conclusion that the lawsuit was focused on purely internal union matters."[29] That, the majority would urge us to believe is also true here. There are two answers to that contention. The first is to hypothesize Mr. Lockridge's answer if we were to ask him if he would like his union membership back or his seniority rights and his damages, but not both. And the second answer, a corollary of the first, is that it is impossible to say

[29] 373 U.S. 690 at 697.

that this Court in this case has not focused sharply on *conduct* touching Lockridge's employment relation when *all* of the relief—excepting restoration of simple union membership—necessarily had to turn on this Court's interpretation of § 3 of the collective bargaining contract between the defendant union and Greyhound. How could we award seniority rights and back wages to this plaintiff if we had not concluded that the union had not been acting in pursuance of a lawful union security agreement? And that determination is not "merely peripheral" to the Act nor is it one which involves wholely internal union matters. The conclusions which the Court has made in this case today are on precisely the sort of "difficult and complex problems" which, under the primary jurisdiction rationale of *Garmon*, are solely within the competence of the expert National Labor Relations Board. The problems of interpretation of the union charter and the bargaining contract here are no less difficult than are some of the "problems of definition" consigned to the Board in *Perko*. It is not, despite the *ipse dixit* of the majority, "obvious * * * that Lockridge was *not* subject to suspension or dismissal." And it is not for us to decide if our intrusion into the regulation of this conduct will "not militate against the discipline which is necessary to preserve the goals of concerted action, but rather militate in favor of the basic purpose for which national labor law was created." That determination, no matter what may be our own view of our competence, has been taken from us and vested wholely in the expert N.L.R.B., as a matter of federal law, under the *Garmon* rule. Whatever the current status of the *Gonzales* case might be, it is clear that the rule in the *Garmon* case, as applied in *Borden* and *Perko*, requires that the courts of Idaho refuse to assert the jurisdiction which they do not have in this case.

To make one point for a second time, the concession that the conduct regulated in this instance did probably constitute an unfair labor practice (which conclusion is

not that terribly clear) should have ended this case. The statement by the majority that:

> "Pre-emption is not established simply by showing that the same facts will sustain two different legal wrongs. This would be analogous to precluding a contract action by proving the facts also establish a tort,"

grossly misinterprets the *Garmon-Perko-Borden* rule which specifically rejects the notion that what is important is the theory upon which a case is tried. The rule is if *conduct* which is to be regulated is reasonably arguably covered by § 7 and § 8 of the Act, then the jurisdiction to regulate that conduct belongs solely to the national agency.

The correct rule is clearly a crude, simple device. It fails to make subtle distinctions "in order to ascertain the precise nature and degree of federal-state conflict * * * and more particularly what exact mischief such a conflict would cause."[30] It is thus on purpose. It is designed to avoid the sort of confused and unbelievably protracted litigation with which we are faced in this case. It should have been allowed to have effect the first time this case came to this Court well over seven years ago. It should, as a function of our position in the federal system as defined by the Supremacy Clause, be given effect even now.

The Supreme Court of the United States sought for a decade to devise a better rule. It could not. The rule which we have in *Garmon* is at least easy to apply—and we should apply it. If we are unhappy with this situation we can only plead with those responsible for the dominant federal law—the United States Supreme Court, and, more importantly, the Congress—to make a change.

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[30] San Diego Building Trades Council v. Garmon, 359 U.S. 236, 242 (1959).

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution: Supremacy Clause

Article VI, Section 2 of the Constitution of the United States reads in pertinent part as follows:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

National Labor Relations Act: Sections 7, 8(a)(3), 8(b)(1)(A) and 8(b)(2)

The pertinent statutory provisions are the following, in the National Labor Relations Act, as amended, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.*:

Section 7, 29 U.S.C. § 157, provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)] of this title."

Section 8(a)(3), 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer:

> "by discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * *: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section [7]: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *."

Section 8(b)(2), 29 U.S.C. § 158(b)(2) provides in pertinent part as follows:

"It shall be an unfair labor practice for a labor organization or its agents—* * * to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."